STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GERRY ANTOINE SWAIN,

Defendant-Appellant.

UNPUBLISHED
July 21, 2009

No. 283368
Oakland Circuit Court
LC No. 2007-213193-FC

Before: Davis, P.J., and Murphy and Fort Hood, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529, first-degree home invasion, MCL 750.110a(2), and two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced to concurrent terms of 126 months to 30 years' imprisonment for armed robbery, and 7 to 20 years' imprisonment for first-degree home invasion, both sentences to run consecutively to two years' imprisonment for the felony-firearm convictions. Defendant appeals as of right. We affirm.

Defendant first argues that several incidents of prosecutorial misconduct occurred. We review unpreserved claims of prosecutorial misconduct for plain error. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). "The test for prosecutorial misconduct is whether, after examining the prosecutor's statements and actions in context, the defendant was denied a fair and impartial trial." *People v Hill*, 257 Mich App 126, 135; 667 NW2d 78 (2003). Claims of prosecutorial misconduct are considered on a case-by-case basis, and the actions of the prosecutor are considered as a whole and evaluated in light of the defense arguments and the evidence admitted at trial. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). Prosecutors are afforded great latitude regarding their arguments and conduct at trial. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

First, defendant argues that the prosecutor insinuated that defense counsel treated a witness, Dorothy King, improperly in an attempt to mislead the jury. "A prosecutor cannot personally attack the defendant's trial counsel because this type of attack can infringe upon the defendant's presumption of innocence." *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996). When a prosecutor personally attacks defense counsel, he may shift the focus from the evidence to the defense counsel's personality. *People v Unger*, 278 Mich App 210, 236; 749 NW2d 272 (2008). However, "an otherwise improper remark may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel's argument."

Kennebrew, supra at 608. Here, the prosecutor did not personally attack defense counsel. Although the prosecutor asked King if she had ever been "dragged into court" or "interrogated in this fashion," a prosecutor "may use 'hard language' when it is supported by the record and he is not required to phrase his statements or questions in the blandest of all possible terms. See *People v Ullah*, 216 Mich App 669, 678-679; 550 NW2d 568 (1996). Here, the comments followed a vigorous cross-examination by two different defense attorneys, and the prosecutor's comments did not personally reference defense counsel. The prosecutor's primary purpose in asking the challenged questions was not to portray King as a victim of defense counsels' cross-examination but to explain inconsistencies raised during cross-examination. A prosecutor is permitted to respond to issues raised by defense counsel. *Kennebrew, supra* at 608. None of the prosecutor's comments were presented in a way that would have shifted the focus of the jury from the evidence to defense counsel's personality, and the question's were asked in direct response to defense counsels' arguments. There was no error.

Second, defendant asserts that during his opening statement and closing argument, the prosecutor improperly appealed to the jury's sympathy, civic duty, and argued facts not in evidence. "A prosecutor may not appeal to the jury to sympathize with the victim." *Unger, supra* at 237. In addition, a prosecutor may not make a civic duty argument that appeals to the fears and prejudices of the jurors because this injects issues broader than the guilt or innocence of the accused into the trial. *Bahoda, supra* at 282-284. While Prosecutors cannot make statements of fact unsupported by the evidence, they are free to argue the evidence and all reasonable inferences from the evidence as it relates to the case. *People v Schultz*, 246 Mich App 695, 710; 635 NW2d 491 (2001).

Read as a whole, the prosecutor's comments do not appeal to the jury's sympathy or civic duty. Although the prosecutor made reference to the victims' ages and referred to the fact that the crime took place in a home where one traditionally feels safe, such comments are permissible if the evidence presented at trial supports the prosecutor's characterizations. *People v Warren*, 200 Mich App 586, 589-590; 504 NW2d 907 (1993). Here, the evidence supports the prosecutor's comments because the victims were elderly and robbed in their home. Moreover, the prosecutor's comments were not a "call to convict" as a matter of civic duty and did not inject issues broader than the guilt or innocence of the accused into the trial. *Bahoda, supra* at 282-284. Furthermore, defendant's argument that the prosecutor argued facts not in evidence does not warrant relief. The prosecutor's challenged comment that defendant and codefendant Raemon Smith had chosen an occupation that enables them to take advantage and prey upon the elderly was supported by reasonable inferences from the evidence. The prosecutor was free to argue the reasonable inference that defendant and Smith chose to provide for their needs by taking money from people who may not be able to defend themselves. *Schultz, supra* at 710.

Third, defendant argues that the prosecutor misstated the law. A prosecutor's clear misstatement of the law may deprive a defendant of a fair trial if it remains uncorrected; however, if the jury is correctly instructed on the law, an erroneous legal argument made by the prosecutor can be cured. *People v Grayer*, 252 Mich App 349, 357; 651 NW2d 818 (2002). The prosecutor's statement that his theory is "innocent until proven you ran" is a misstatement of the law; however, read in context, it is clear that the prosecutor was permissibly arguing using evidence of flight and the weight of that evidence. *People v Guenther*, 188 Mich App 174, 177; 469 NW2d 59 (1991). Evidence of flight is admissible to show consciousness of guilt. *People v*

Compeau, 244 Mich App 595, 598; 625 NW2d 120 (2001). Furthermore, the trial court correctly instructed the jury concerning what weight to give evidence of defendant's flight when the police tried to arrest him. Therefore, there was no clear misstatement of the law that remained uncorrected. *Grayer*, *supra* at 357.

Defendant next argues that the trial court violated defendant's right to a fair trial when it denied defendant's motion to suppress his pre-*Miranda*[1] statement pertaining to the location of the handgun. We review a trial court's decision on a motion to suppress de novo. *People v Frohriep*, 247 Mich App 692, 702; 637 NW2d 562 (2001). In general, the prosecution may not use a defendant's statements as evidence unless he received *Miranda* warnings before questioning began. *Miranda*, *supra* at 444; *People v Daoud*, 462 Mich 621, 629; 614 NW2d 152 (2000). However, *Miranda* warnings may be excused where the police questions involve overriding public safety concerns. *New York v Quarles*, 467 US 649, 651; 104 S Ct 2626; 81 L Ed 2d 550 (1984); *People v Attebury*, 463 Mich 662, 670; 624 NW2d 912 (2001). To trigger application of the public safety exception, the questions must be objectively necessary to secure the public safety and not solely for an investigatory purpose. *Quarles*, *supra* at 659 n 8; *Attebury*, *supra* at 670-671. Possible public safety concerns include an accomplice using the weapon or a bystander later coming upon the weapon. *Quarles*, *supra* at 657.

We find that the trial court properly determined that defendant's statement pertaining to the location of the weapon was admissible under the public safety exception. The police received reliable information from one of the robbery victims that the suspects were armed with a handgun. Officer Al Kinal was aware that the police officers who were holding one of the suspects in custody did not find a weapon, and he searched defendant and the boat where defendant was hiding without finding the weapon. Officer Kinal was concerned for the safety of the general public because children or anyone in the residential area could find the weapon and use it to harm somebody. Officer Kinal limited his question to locating the abandoned handgun, and defendant nodded to the east and said, "It's over there in some bushes." Officer Kinal's question was objectively reasonable to protect the public from any hidden weapons that defendant may have discarded while fleeing from the police. *Attebury*, *supra* at 670-671. The trial court did not err in refusing to suppress defendant's statement or the gun. *Id*. at 670-671.

Defendant next argues that his statements to the police were involuntary because during the interrogation he was physically battered and threatened by the police. We disagree. Our review of the trial court's determination that a statement was voluntary is de novo; however, we will not disturb the trial court's factual findings absent clear error. *Daoud*, *supra* at 629. Statements made by a defendant during a custodial interrogation are inadmissible unless the defendant voluntarily, knowingly, and intelligently waived his Fifth Amendment rights. *People v Abraham*, 234 Mich App 640, 644; 599 NW2d 736 (1999). Based on the totality of the circumstances, the trial court must determine whether a statement is "the product of an essentially free and unconstrained choice by its maker, or whether the accused's will has been overborne and his capacity for self-determination critically impaired." *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988).

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

The trial court found that defendant was given his *Miranda* warnings and that he voluntarily gave two statements to the police. We agree. The evidence indicated that the injuries defendant received before the interrogation were sustained in an effort to place him in custody. There was no causal connection between the injuries defendant received at the time of his arrest and his giving of the subsequent statements. *People v Wells*, 238 Mich App 383, 389; 605 NW2d 374 (1999). Different officers than those who arrested defendant interviewed him at the police station, and he was coherent, rational, and understood the questions asked of him during the interview. Defendant's age, intelligence, and experience with the criminal justice system coupled with the relatively short period of time when defendant was advised of his constitutional rights and the time defendant admitted to shooting the shotgun all weigh in favor of defendant's statements being voluntary. Nothing on the record indicates that defendant's will was overborne and his capacity for self-determination critically impaired. *Cipriano*, *supra* at 333-334. On this record, we will not disturb the trial court's finding that defendant's statement was voluntary because defendant has failed to establish that the trial court's findings were clearly erroneous. *Daoud*, *supra* at 629.

Affirmed.

/s/ Alton T. Davis
/s/ William B. Murphy
/s/ Karen M. Fort Hood